Supreme Court, U.S.
FILED
FEB 14 1996
CLERK

No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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SUMMARY OF ARGUMENT

The National Labor Relations Board ("NLRB" or "Board"), in its brief, concedes that Holly's chicken catchers and forklift operators work "on a farm" within the meaning of §3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(f) (1978). NLRB Br. 18. Board counsel does not dispute that the chicken catchers and forklift operators perform "preparation for market"

and that the live haul drivers perform "delivery to market." NLRB Br. 21-22. Board counsel's sole position is that the activities of the live haul crew are not performed "as an incident to or in conjunction with" the farming operations of either Holly or the independent grower. Rather, according to the Board, the work of these employees is incidental to Holly's processing operations. NLRB Br. 22.

The Board's interpretation of the phrase "as an incident to or in conjunction with such farming operations" is highly artificial and contrary to the plain language of §3(f). Section 3(f) specifically defines "preparation for market" and "delivery to storage or to market" as activities that are *per se* incidental to farming.

Board counsel, however, argues that the farming operations of both Holly and the grower have ended at the time that the live haul crews perform their work. Thus, according to Board counsel, the chickens have no farmer, even though they have not been reduced to possession or delivered to market.

The absurdity of Board counsel's position is readily apparent and is contrary to the Court's decisions in *Mitchell v. Budd*, 350 U.S. 473, 481 (1956) and *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260-262 (1955). The work of the chicken catchers and forklift operators begins and ends on the farm and results in no physical changes to the chickens. It constitutes "harvesting" in that it is the sole means by which the chickens are reduced to possession. Holly's processing operations, on the other hand, occur at a plant many miles away and result in a product that is sold in supermarkets.

In its efforts to prove that the independent grower ceases to be a farmer when the live haul crew arrives on the farm, Board counsel has effectively proved Holly's contention that it resumes its status as a farmer. Thus,

as Board counsel argues, the chickens are owned by Holly and the live haul functions are performed by Holly. Clearly, Holly has resumed its status as a farmer. Thus, the live haul employees satisfy the statutory definition of agricultural laborers. The Board's conclusion to the contrary is unreasonable and should be rejected.

ARGUMENT

I.

BOARD COUNSEL PROFFERS RATIONALES THAT ARE CONTRARY TO DECISIONS OF THE BOARD. THESE RATIONALES CANNOT BE USED TO SUSTAIN THE BOARD'S DECISION.

As was discussed in Holly's opening brief, the Board has historically read the "on a farm" language out of §3(f) by taking the position that if anyone other than the farmer performs a particular practice with regard to the farmer's agricultural commodities, that person is acting in furtherance of some separate business interest. Under the Board's view, no one, other than a farmer, can ever be exempt. Holly Opening Br. 24. The notion that only a farmer can perform secondary agricultural tasks has been reduced by the Board to a hornbook principle that the Board cites by rote. Thus, in this case, the sole justification offered by the Board to support its conclusion that Holly's live haul employees are not agricultural laborers is "that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." J.A. 229.

In its brief, the Board's appellate counsel now concurs (as it must) with Holly's statement that "the legislative history clearly shows that 'Congress intended that the definition of an agricultural laborer would include nonfarmers so long as their work involved primary farming

activities or occurred on a farm and was incidental to the farming operations of the farm.' " NLRB Br. 24 (quoting Holly Br. 14-15). Thus, the Board now concedes that "wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm." NLRB Br. 23 (quoting *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 767 (1949)).

On its face, this concession would seem to also concede that the Board's decision is erroneous as its concerns Holly's chicken catchers and forklift operators. The Board's counsel, however, attempts to contain the damage flowing from this concession by arguing that Congress only intended to exempt employees of independent contractors who are in the " 'business of doing nothing but' providing chicken catching and transportation services."[1] (NLRB Br. 24). Section 3(f) contains no such limitation and no specific citation to the legislative history is given to support the Board's assertion. In fact, there is nothing in §3(f) or the legislative history that even remotely suggests that Congress was concerned about what other business interests, if any, the third party might have. Instead, Congress was interested in the nature of the work being performed. 81 Cong. Rec. 7888 (1937).

Board counsel's analysis of §3(f) and its legislative history cannot be found in any Board decision. The Court has made explicitly clear that "courts may not accept

[1] In footnote 11 of his brief, Board counsel attempts to further qualify this asserted limitation on §3(f). Thus, he states that if "the chicken catchers and forklift operators of an independent contractor were hired by a grower to cage and load chickens both raised and *owned* by the grower, the work of the chicken catchers and forklift operators *might* be [within the definition of agriculture]. NLRB Br. 28 (emphasis added). Board counsel's importation of an ownership requirement is not supported by the language of §3(f). His use of the word "might" demonstrates the extreme reluctance with which he makes the necessary concession.

appellate counsel's *post hoc* rationalizations for agency action. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

What is more damaging to this *post hoc* analysis, however, is that it directly contradicts prior decisions of the NLRB. Thus, in *Produce Magic, Inc.*, 311 N.L.R.B. 1277 (1993), the Board held that employees of a "custom harvester," who was in the "business of doing nothing but" going to the farms of clients, packing lettuce grown on the farms into cartons, and loading the cartons onto trucks, were not engaged in secondary agriculture. The sole basis proffered to support this conclusion was that the lettuce was grown by the farmer rather than the employer. Clearly, if an agency decision cannot be upheld on the basis of a *post hoc* rationalization never considered by the agency, it cannot be upheld on the basis of a rationalization that is directly contrary to the agency's own decisions.

The fact that Board counsel felt compelled to resort to a *post hoc* rationale that was directly contrary to a prior Board decision is a strong indication that the Board's decision is not entitled to any deference. Indeed, as will be shown below, the Board's decision has no reasonable basis whatsoever.

II.
BOARD COUNSEL'S INTERPRETATION OF THE SECTION 3(f) DEFINITION OF SECONDARY AGRICULTURE IS ARTIFICIAL.

The Board, in its brief, makes the following significant concessions:

(1) Holly acts as a farmer in conducting its hatchery operations (NLRB Br. 21);

(2) Holly's pullet haulers, who catch pullets on the farms of independent growers and transport them to laying houses owned by other independent growers, and Holly's egg haulers, who transport eggs from the laying houses to Holly's hatcheries, are agricultural laborers (NLRB Br. 5 n.4);

(3) The independent growers, who raise the broiler chicks under contract with Holly, are farmers engaged in primary agriculture (NLRB Br. 18);

(4) Holly's chicken catchers and forklift operators work on the farms of the independent growers (NLRB Br. 18);

(5) Holly's chicken catchers and forklift operators perform "preparation for market" (NLRB Br. 21-22); and

(6) Holly's live haul drivers perform "delivery . . . to market" (NLRB Br. 21-22).

Despite these concessions, Board counsel takes the position that "the live haul crew's work falls outside Section 3(f) because it is not performed incidentally either to any primary farming operation by Holly Farms, or to the independent growers' operations." NLRB Br. 22. This position is based on an artificial reading of the phrase "as an incident to or in conjunction with such farming operations."

A. The Chickens Must Have A Farmer And The Only Two Choices Are Holly Or The Independent Growers.

The first difficulty with the interpretation of Board counsel is that it leads to the inevitable conclusion that the chickens, while still running loose on the farm, have no farmer. Under Board's counsel's view, at the precise

moment that Holly's live haul crew arrives at the farm, the independent grower ceases to be a farmer with respect to the chickens that he has raised. NLRB Br. 18. In addition, Holly assertedly ceased to be a farmer with respect to these same chickens when it turned them over to the farmer to be raised. NLRB Br. 16. Inasmuch as the Board does not suggest that anyone else is the farmer of these chickens, it follows that the chickens have no farmer.

The absurdity of this conclusion is obvious. Moreover, it constitutes a repudiation of the argument that the Board advanced in *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298 (1977). In *Bayside*, the Board took the position that "the owners of the farms are independent contractors rather than employees of Bayside and therefore the farming activity at these locations is attributable to them rather than Bayside." 429 U.S. at 302. Having prevailed on that issue in *Bayside*, the Board now contends that the catching and caging of the chickens on the farms of the growers is *not* attributable to the independent grower.

If the Board had held, as it did in *Bayside*, that the work of Holly's live haul crews was incidental to the independent growers' farming operations, this conclusion might be deemed reasonable. If the Board had held that the work of the live haul crews was incidental to Holly's farming operations, this conclusion would clearly be reasonable. What if cannot do is deny that these activities are incidental to anyone's farming operations.

The Board correctly notes that secondary practices must be incidental to "such" farming operations, *i.e.*, the farming operations of the farmer who performs the secondary practice or the farming operations of the farm on which the practices take place. NLRB Br. 14-15. In *Farmers Reservoir Co. v. McComb*, 337 U.S. 755, 766 n.15 (1949), the Court explained that "processing on a farm of commodities produced by other farmers is inci-

dental to or in conjunction with the farming operations of other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done." (citation omitted). Here, Holly's chicken catchers perform activities on chickens raised on the farms on which they perform their work. Furthermore, the chickens are owned by Holly. Thus, the "such" requirement of §3(f) is clearly satisfied.

Board counsel cites to a regulation of the Secretary of Labor, which states that "[t]he line between practices that are and those that are not performed 'as an incident to or in conjunction with' such farming operations is not susceptible of precise definition." NLRB Br. 28. While this may be true for certain types of activities, Congress, in enacting §3(f), specifically denominated certain activities, including "preparation for market" and "delivery to storage or to market," as activites that are incidental to or in conjunction with primary farming. Thus, the Board's contention that the live haul crew's work "is more accurately characterized as the first step of [Holly's] chicken-processing operation, rather than as the last step of the independent growers' primary farming operations" (NLRB Br. 19) is directly contrary to the express statutory language.[2]

As explained in Holly's opening brief, the statute does not require that the secondary practices be "solely" or

[2] In its brief, the Intervenor-Union cites to publications from the poultry industry which classify the live haul operations with processing operations. Union Br. 6-10. Inasmuch as this information was never presented to or relied upon by the Board, it cannot be used to sustain the Board's decision. *Chenery*, 332 U.S. at 196. Furthermore, the statutory definition of agriculture takes precedence over any classification scheme of the industry. Indeed, in the representation hearing, the Board rejected the contention that the live haul employees shared a community of interest with the processing plant employees. J.A. 35a.

"exclusively" incidental to farming operations. If that were the case, the independent wheat thresher cited in the legislative history would not be exempt because his employees would be acting in furtherance of the wheat thresher's separate business interests. The statute does not even require that the activities be "more" related to the farming operations than to some other operation. Holly Br. 23-24. All that is required is that the activities be fairly characterized as being incidental to the farming operations. *See Farmers Reservoir Co.*, 337 U.S. at 766 (work of irrigation company employees in supplying water to farmers, which farmers used to irrigate crops, "does constitute a practice performed as an incident to or in conjunction with farming").

Even if the statute required a comparison of all operations to which the secondary activites were incidental to determine which operation it was *most* incidental to, the Board's argument would still fail. Board counsel's efforts to characterize the activities of catching and caging chickens and delivering them to market as part of a "processing" or "slaughtering" operation is unpersuasive. Holly's processing operations take place at a separate location many miles from the farms and involve killing the chickens and performing a substantial number of operations that result in the ready to cook product that appears in the local supermarket. The activities of the live haul crew are not even remotely similar to the activities that occur at Holly's processing plant. The work of the chicken catchers and forklift operators begins and ends on the farms. These employees effectuate no physical changes whatsoever in the chickens. They merely reduce the chickens to possession and transport them to market.[3]

[3] Although, as the Board notes, Holly's live production manager testified that the catching and delivery of the chickens was the first step of the processing operation (NLRB Br. 20) this testimony

[footnote continued]

If the Board's analysis were adopted, it would logically follow that Holly's hatchery operations would be non-agricultural inasmuch as these operations are the "first step" in the processing of the chicken. Yet, the Board concedes, as it must, that Holly's hatchery employees are agricultural laborers.

B. The Work Of The Live Haul Crews Is Incidental To The Farming Operations Of Both Holly And The Independent Growers.

The Agreement between Holly and the independent growers, which is set out completely in the Appendix to the Board's brief, establishes their mutual relationship in raising the chickens. The Agreement states that Holly "is engaged in the production of poultry on an integrated basis, being responsible for the rearing of chickens from the breeder hens to the processing of the poultry into dressed product." NLRB Br., App. 1a. Although Holly retains "title to feed, chicks, and medication" at all times (NLRB Br., App. 8a), the independent grower uses his experience, skill, and knowledge "to supervise and direct

was given in the context of an inquiry into the "community of interest" between the live haul crews and the processing employees. Under §9(b) of the National Labor Relations Act, 29 U.S.C. §159(b), the Board employs a "community of interest" analysis in determining whether different groups of employees should be included within the same bargaining unit. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). At the Board's representation hearing, Holly's primary contention was that the live haul employees were exempt agricultural laborers. However, it made an alternative contention that, if the live haul employees were found to be statutory employees, they shared a community of interest with the processing plant employees and that the unit should include the processing plant employees. J.A. 35a. The Board, however found that the processing plant employees did *not* share a sufficient community of interest to warrant their inclusion in the bargaining unit. J.A. 39a. Thus, Board counsel is once again arguing contrary to the Board's own decision.

the efficient rearing of broilers." NLRB Br., App. 1a. Holly's employees actually do the catching and caging of the chickens on the farms of the grower. However, the Agreement requires the grower "[t]o be present during the catching or removal of the broilers." NLRB Br., App. 3a.

Clearly, the Board's position that neither Holly nor the independent grower is functioning as a farmer during the catching, caging, and delivery to market of these chickens is factually without support. In fact, both Holly and the grower have a vested interest in the chickens during this process, Holly because of its ownership interest and the independent grower because his pay is based largely on the total pounds of poultry grown.

In an effort to prove that the independent grower ceases to function as a farmer when Holly's live haul crew arrives at the farm, Board counsel makes the following argument:

> [T]he live haul crews' work involves property that belongs to petitioners, not the independent growers. Moreover, Holly Farms has not been retained by the independent growers to render the independent growers any service; rather, the growers have been hired by Holly Farms to perform a service for Holly Farms: raising the chicks to maturity. The live haul crews' work begins only after the independent growers' responsibilities have ended.

NLRB Br. 28 (footnote omitted). With the exception of the last sentence,[4] Holly agrees completely with these

[4]The contract requires the grower to be present during the catching process. NLRB Br., App. 3a. Moreover, a publication cited by the Union indicates that the grower's responsibilities continue during and after the catching and loading process. C. Parkhurst and G. Mountney. *Poultry Meat and Egg Production* 191 (Van Nostrand Reinhold Co. 1988).

factual assertions. What Board counsel has effectively done is prove Holly's contention that it resumes its status as a farmer when its live haul employees begin their work. Indeed, Board counsel states "it is 'highly significant' whether the practice involved property to which the farmer has title or for which the farmer otherwise has responsibility." NLRB Br. 27 (citing 29 C.F.R. §780.-143). If, as Board counsel asserts, the grower is no longer a farmer, then Holly, by necessity, must resume its status as a farmer.[5] Under §3(f), agriculture is not completed until the agricultural commodity is delivered to market or to storage for delivery to market. *See Mitchell v. Budd*, 350 U.S. 473, 481 (1956).

C. The Agricultural Exemption Does Not Turn On The Destination Of The Chickens.

In *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260-262 (1955), the Court held that the employer's employees who transported workers to and from the fields and sugar cane from the fields to the employer's mill were agricultural laborers. Board counsel argues that the determinative facts in *Maneja* were that "the employer's mill, railroad tracks, and fields were all located on the employer's sugar plantation, and only cane grown in those fields was processed at the mill." NLRB Br. 18-19, n.8. The suggestion appears to be that had the mill been located off the plantation, the Court would have reached a different conclusion.

[5] Board counsel's assertion that even if Holly acts as a farmer in sending out its live haul crews, the live haul employees would still not be agricultural laborers (NLRB Br. 21), makes no sense. If Holly is acting as a farmer in catching, caging, and delivering its chickens to market, then its live haul employees are by definition acting incidentally to Holly's farming operations. Similarly, Holly does not comprehend Board counsel's assertion that even if the live haul employees act as an incident to farming operations, they do not act "in connection with" farming operations. NLRB Br. 28.

It is clear, however, that the Court's decision in *Maneja* was not based on the location of the mill. In fact, the Court pointed out that "had Waialua not owned a mill, its transportation activities from field to mill would come squarely within the agricultural exemption covering 'delivery to storage or to market or to carriers for transportation to market.'" 349 U.S. at 261. Obviously, the Court saw no difference between delivery to a mill on the employer's property and delivery to a mill located elsewhere.

The more fundamental point established by *Maneja*, which runs counter to the entire line of reasoning of Board counsel, is that the agricultural exemption does not turn on the ultimate destination of the agricultural product. Whether the market is the employer's processing plant, another person's processing plant, a wholesaler, a retailer, or the ultimate consumer is simply irrelevant. It is the nature of the employee's duties, not the destination of the product, that is determinative.

The position of Board counsel, however, is inalterably premised on the fact that the destination of Holly's chickens is Holly's processing plant. It is this fact, and this fact alone, on which Board counsel asserts that the activities of the live haul crew are incidental to Holly's processing operations. Indeed, Board counsel attempts to distinguish the Fifth Circuit's decision in *Johnston v. Cotton Producers Assn.*, 244 F.2d 553 (5th Cir. 1957), largely on the grounds that the employer of the employee who caught and cooped the chickens "had no use for the mature chicks" and the chickens "were delivered to third-party processors, not to the retail store." NLRB Br. 30. This distinction, which focuses solely on the destination of the chickens, is simply irrelevant.

In summary, Board counsel's analysis of the §3(f) definition of secondary agriculture is result-oriented and unpersuasive. Holly requests that the Court reject this analysis.

III.
HOLLY DID NOT WAIVE ITS CONTENTION THAT ITS CHICKEN CATCHERS AND FORKLIFT OPERATORS ARE ENGAGED IN PRIMARY AGRICULTURE.

The Board argues that Holly waived its contention that its chicken catchers and forklift operators are engaged in "primary agriculture" by allegedly not raising it before the Board or the court of appeals. NLRB Br. 31-32. This contention is without merit.

Section 10(e) of the Act, 29 U.S.C. §160(e), provides, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986), the Ninth Circuit explained §10(e) as follows:

> Congress enacted section 10(e) to ensure that the NLRB has an opportunity to apply its special expertise to an issue before that issue is presented to an appellate court. . . . Section 10(e) bars judicial review when no objection has been filed, . . . , or when only an ambiguous, general objection to the decision has been filed. . . . However, an objection will meet the statutory requirement if it is not "so ambiguous as to be totally ineffective to adequately apprise the Board" that the issue is disputed.

Id. at 713 (citations omitted). Section 10(e) requires "notice of objection." It does not require "briefing and argument before the Board." *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1192 (D.C. Cir. 1984).

Throughout this proceeding Holly has consistently and repeatedly argued that the live haul employees are exempt agricultural laborers and cannot properly be included in a bargaining unit. On March 14, 1989, the Board held a representation hearing to determine the scope of the appropriate bargaining unit. At this hearing, counsel for Holly stated on the record that it was Holly's position that all of the employees in the requested unit "are exempt from the coverage of the National Labor Relations Act as being agricultural employees within the provisions of the Fair Labor Standards Act." Rep. Hearing at 10.

On March 27, 1989, the Board's Regional Director issued a Decision and Order dismissing the Petition. J.A. 17a-23a. The Union subsequently filed a Request for Review with the Board. The Regional Director treated it as a motion for reconsideration and reopened the hearing for further evidence. Subsequently, on June 20, 1989, the Regional Director issued a Supplemental Decision in which he found that Holly's hatchery employees were exempt agricultural laborers, but that the live haul employees were not agricultural laborers. J.A. 33a-42a.

On or about April 7, 1989, Holly filed with the Board a Request for Review and Stay of Election. In this Request, Holly's counsel stated:

> The Regional Director also erred in his original order wherein he concluded that "the live haul employees, designated as chicken catchers, who work out of the processing plant . . . [are] not included either in the primary or secondary definition of "agriculture" in section 3(f) of the FLSA." (Decision and Order p. 2).

Request for Review pp. 3-4. Holly contended in this Request that all of the live haul employees were agricultural laborers under the prevailing precedents.

On July 20, 1989 the Board issued its Decision on Review and Order in which it denied Holly's Request for Review. J.A. 43a-45a. This Decision was not a final order and was not immediately appealable. However, in the ensuing unfair labor practice case, Holly continued to

press its contention that the live haul employees were exempt agricultural laborers. In the ALJ's Decision, issued on March 12, 1992, the ALJ stated:

> The Respondents maintain, as they have during the course of Case 11-RC-5583, that the live haul employees cannot appropriately be included in a Board-found bargaining unit because they are agricultural workers, exempt under Section 2(3) of the Act. . . .
>
> I, of course, am bound by the Board's prior determination that the unit as described is appropriate.

Pet. App. 786-787.

Holly filed timely exceptions to the ALJ's Decision. These exceptions specifically challenged the ALJ's conclusion that the live haul unit was an appropriate bargaining unit. Respondents' Exceptions, nos. 119, 487, 549(w). The Board majority, however, declined to reconsider "the Board's prior determination in the representation case that the live haul workers are statutory employees." Pet. App. 83.

Clearly, the Board was repeatedly placed on notice of Holly's position that the live haul employees were exempt agricultural laborers within the meaning of §3(f) of the FLSA. This is all that was required under §10(e) of the NLRA.

In its brief to the Fourth Circuit, Holly continued to press its contention that the live haul employees were exempt agricultural laborers. Holly discussed §3(f) in detail and the various precedents interpreting §3(f). Although Holly discussed the secondary branch of agriculture in greater detail[6], at no point did Holly suggest

[6]This was the result of the fact that most of the cases dealing with live haul crews have focused on the secondary branch of

[footnote continued]

or concede that the chicken catchers and forklift operators were not engaged in primary agriculture. Indeed, Holly pointed out that "[r]egardless of whether a particular practice constitutes 'primary' farming or 'secondary' farming, the legal effect is the same: Individuals engaged in such employment are not employees under the Act." Br. at 11.

In the petition for certiorari, Holly contended that "Holly's chicken catchers, forklift drivers, and live-haul drivers clearly come within the scope of the agricultural exemption." Pet. 63. Holly did not limit this contention to either primary or secondary agriculture.

The Board's contention that Holly waived the "primary" agriculture issue is without merit. Holly repeatedly advised the Board and the court of appeals of its contention that the live haul employees were exempt agricultural laborers within the meaning of §3(f). The position of Board counsel that Holly had some sort of obligation to argue more forcefully the primary agriculture issue is without merit. Holly argued the applicability of §3(f), which includes both the primary and secondary branches of agriculture.[7] That was sufficient to preserve its position.

§3(f). *E.g., Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980); *Johnston v. Cotton Producers Assoc.*, 244 F.2d 553 (5th Cir. 1957).

[7]Significantly, §3(f) does not contain the words "primary" or "secondary." These classifications were developed by the Court in *Farmers Reservoir.*

IV.
BOARD COUNSEL'S INTERPRETATION OF PRIMARY FARMING IS INCONSISTENT WITH THE STATUTE.

Board counsel argues that the term "harvesting," as used in §3(f), is limited to crops and that chickens can be raised but cannot be harvested. This contention is based on the fact that §3(f) first speaks of "the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" and then speaks of "the raising of livestock, bees, fur-bearing animals, or poultry." According to Board counsel, the second phrase is superfluous if animals can be harvested. NLRB Br. 33.

This contention is unfounded. Section 3(f) specifically mentions harvesting of "any" agricultural commodity. Chickens are clearly an agricultural commodity. 29 C.F.R. §780.112. The term "raising of . . . poultry" speaks to the process of feeding and caring for chickens, functions that are analytically distinct from "harvesting." Thus, §3(f) includes both the raising of poultry and the harvesting of any agricultural commodity. The first phrase does not render the second phrase superfluous. Furthermore, having clearly stated that any agricultural commodity could be "harvested," there was no need for Congress to repeat this term when it exempted the "raising of . . . poultry."

Although Board counsel candidly admits that Holly's interpretation of the Secretary of Labor's regulations is "plausible in isolation," (NLRB. Br. 34), he contends that this interpretation is nevertheless inaccurate. Board counsel does not appear to dispute that the Secretary of Labor has indicated that harvesting extends to the "actual process whereby agricultural commodities are . . . reduced to possession" and to "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b).

Rather, Board counsel points to language at the beginning of the regulation and argues that this language forecloses the primary farming argument. The language relied upon states that harvesting "includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position." 29 C.F.R. §780.118(a). From this language, the Board argues that only crops, and not chickens, may be harvested.

Holly readily concedes that harvesting "includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position." 29 C.F.R. §780.118(a). In addition, however, harvesting includes the "actual process whereby agricultural commodities are . . . reduced to possession" and "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b). The fact that harvesting "includes" activities regarding crops does not preclude it from applying to chickens. Indeed, Board counsel concedes that fish can be harvested. NLRB Br. 34 (citing *Domsea Farms, Inc.* 211 N.L.R.B. 832 (1974); 29 C.F.R. §780.109). It is illogical that the harvesting of fish, a non-crop agricultural commodity not even mentioned in §3(f), constitutes primary agriculture, but the harvesting of poultry, an agricultural commodity specifically mentioned in §3(f), does not constitute either primary or secondary agriculture.

CONCLUSION

The Board's conclusion that Holly's live haul crews do not satisfy the statutory definition of either primary or secondary agriculture is irrational and is not entitled to deference. Holly respectfully requests that the Court reverse the decision of the Fourth Circuit on this issue.

Dated this 14th day of February 1996.

Respectfully submitted,

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